IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 1068.

MEYER EASTMAN, Alias "MEYER ESSTMAN",
and DAVE MARGLOUS,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY BRIEF.

LOUIS B. SHER,
582 Arcade Building,
St. Louis, Missouri,
Attorney for Petitioners.

JOSEPH NESSENFELD,
MAURICE L. MUSHLIN,
St. Louis, Missouri,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

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For the purpose of aiding the Court in its consideration of their petition, petitioners deem it important to point out certain misstatements of essential facts in the Government's brief. These misstatements, though inadvertent, may have a tendency to mislead the Court.

1. The Government states (Govt. Brief, pp. 6-7) that "contrary to petitioners' claim that 'there was no evidence offered by the Government to show the fact that, or the time when, petitioners purchased any distilled spirits at their store for any purpose,' reports filed by petitioners with the Alcohol Tax Unit showed as to six of the eleven

large sales . . . that petitioners had purchased and received the liquor involved on the same day or but a few days prior to resale by them." In support of this statement, the Government's brief, footnote 8, p. 7, contains a table (which is not a part of the record) purporting to set out the alleged "purchases" and sales as taken from petitioners' reports.

The Government makes the same statement in another form on p. 8 of its brief, claiming that "the Government introduced unequivocal evidence—reports made to the Treasury Department by petitioners themselves—showing that in at least six instances petitioners had purchased liquor later illegally sold at wholesale, and, moreover, that these purchases were consummated on the same, or a few days immediately preceding, the days on which the illegal resales were made."

The foregoing statements are wholly untrue. On the other hand, petitioners' statement of the facts is supported by the record; and petitioners submit that the reports relied on by the Government constitute no evidence whatever of purchases.

The following explanation of the nature and purpose of the reports in question may be helpful.

Every liquor dealer who makes sales in quantities of more than 5 wine gallons at any one time must file and make detailed reports of receipts and disposition of liquor. Form 52A is the report of liquor receipts and Form 52B is the report of disposition. The form of such reports is prescribed by the regulations, and no dealer has the right to alter or change the printed language thereof. The same form is required whether the dealer is a retailer who makes occasional quantity sales, or a true wholesaler.

Retail liquor stores such as the Peoples Liquor Store do not maintain "wholesale" inventories, i. e., a separate stock of liquor used for multiple case lot sales. All liquor

purchased by such stores is purchased for regular retail purposes and placed in the regular retail stock. Occasionally, in the ordinary course of their retail business an order is taken for a quantity of liquor in excess of five wine gallons. The dealer is required to make a report of the disposition of such liquor on Form 52B. However, he cannot legally dispose of the liquor until he has "received" it and made an entry of its receipt on Form 52A. For this purpose, the dealer withdraws the quantity sold from his retail stock and transfers it to himself in his capacity as a "wholesale" liquor dealer. By such method (permissible under the regulations) the amount of liquor required to consummate the sale (which the dealer may have purchased or otherwise acquired long before) is "transferred" from the "retail" stock and "received" (not purchased) by the so-called "wholesale" department. It is, of course, wholesale only in the sense that it involves a disposition at one time of more than five wine gallons.

The reports on Form 52A do not constitute any evidence as to when the liquor was purchased. They are reports of the technical "receipt" of the liquor by the dealer in one capacity from himself in another. They are not reports either of purchases on the dates set forth therein or of the actual receipt of the liquor by the dealer from a wholesaler or distributor. In fact, the identical reports would have been made (and required by the regulations) whether the liquor was purchased by the dealer on the same day, one year, or five years before the transfer and "receipt," or even if the liquor had been received by gift or bequest.

The regulations do not require the dealer to report when he makes a purchase of liquor or the quantity purchased by him. He is required to show on Form 52A only the date he technically "receives" any liquor in his capacity as a holder of a wholesale tax stamp (and the amount and description thereof), irrespective of the date he may have

purchased and received such liquor in connection with his retail business. The entry made on Form 52A is made only when the dealer transfers the liquor from his retail stock to his "wholesale" department, because until then such liquor, although it may have been purchased and in his actual possession many years before, has not been "received" by him as a "wholesaler."

Obviously, there is a coincidence in time between the "receipt" and the sale by the dealer, since the very purpose of transferring the liquor from the retail stock and "receiving" it within the meaning of the regulations is to consummate a sale. There is no reason for a retail dealer to "receive" any liquor as a "wholesaler" (i. e., take it out of his retail stock) until he has an order to fill.

The reports relied on by the Government (Government Ex. 3, R. 73; Government Ex. 4, R. 81) show on their face that the liquor described was received by the Peoples Liquor Store from the Peoples Liquor Store—the petitioners themselves. The Government does not explain how petitioners could have purchased the liquor from themselves, nor the basis on which it is contended that such reports constitute "unequivocal" evidence of the time any purchases may have been made by petitioners for any purpose.

Petitioners submit that none of the reports to the Treasury Department contain any evidence of the date the liquor "received" was purchased. The Government does not contend there is any other evidence on that point. Hence, there is an entire failure to prove both the fact that petitioners made purchases of liquor within the limitation period, and the purpose and intent with which any such purchases were made. Unless there is proof of such purchases, a conviction cannot be sustained. It must be borne in mind that the Act is directed against the business of **purchasing** distilled spirits for the purpose of reselling the liquor to trade buyers.

2. The Government's brief reiterates the statement that petitioners made "illegal" resales of liquor at wholesale (Govt. Brief p. 8). This statement is very unfair, since every sale made by petitioners or their clerks was legal and in strict accordance with the law. The Government overlooks the fact that the wholesale tax stamp authorized petitioners to make sales in any quantity.

A sale to a trade buyer is not per se illegal. The Alcohol Administration Act does not prohibit a retail liquor dealer from making sales in intrastate commerce even to trade buyers. When the Government argues to the contrary it misconceives the law. What the Act does prohibit is engaging in the business of **purchasing** liquor for the purpose of selling to trade buyers, i. e., the business of acquiring liquor for distribution to dealers. Obviously, the Act has reference to true wholesalers, with respect to whom there can be no question that they initially acquire distilled spirits in the course of their regular business for disposition to other dealers. The only sales declared illegal by the express provisions of the Act are those made in interstate or foreign commerce, and then only when made by persons engaged in the business of purchasing for resale at wholesale.[1]

Every sale made by petitioners or their clerks was wholly intrastate in character and the purchasers took possession of the liquor on petitioners' premises. Moreover, there was only **one** isolated sale made to a trade buyer, that being the sale by a clerk of twelve cases to

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[1] Section 203 (c) (2) provides, inter alia: "It shall be unlawful, except pursuant to a basic permit . . . (2) for any person so engaged to . . . sell . . . in interstate or foreign commerce . . . distilled spirits . . . so purchased."

For the information of the Court, petitioners have set out in the Appendix forms prescribed by the Treasury Department of the application for a basic permit and the basic permit itself. The Government derives no revenue from the permits and no fee or excise is charged or levied therefor. The basic permit shows on its face its inapplicability to retail liquor dealers doing an exclusively intrastate business.

Fannie Gladdish.[2] Petitioners, of course, neither knew nor had reason to believe she was a dealer or was buying for resale, and the sale was properly recorded in the regular course of business. There is no record basis whatever for the Government's charges (Govt. Brief p. 8) that petitioners made at least six "illegal" sales.

3. Certainly, under the Act it was incumbent upon the Government to prove at last two basic facts: (1) that petitioners engaged in the business of purchasing liquor and (2) that such purchases were made for the purpose and with the intent of reselling such liquor to trade buyers.

The necessity for showing such intent is inherent in the statutory language. If the Act means what it says, the determinative factor must be the intent with which the petitioners made the purchases. The Government raises a false issue when it suggests (Govt. Brief p. 11) that the issue as to intent might have been resolved on the theory that the act is malum prohibitum. Such argument might be proper only if the Act specifically prohibited sales to trade buyers. What the statute does prohibit is engaging in the business of purchasing liquor for resale at wholesale, which necessarily involves the intent with which the liquor was purchased. There is no evidence whatever from which a jury could properly find without resort to speculation and conjecture that petitioners purchased any liquor with the intention of selling the same to trade buyers.

Petitioners concede that ordinarily direct evidence of the intention of a retail liquor dealer to sell his liquor for other than retail purposes is difficult to procure. Petitioners further concede that such intention may be proved by circumstantial evidence. Such concessions, however, are in no way decisive of the case, because there are no circum-

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2 Carlisle testified only that he was a dealer at the time of the trial (18 months after the sale). It is absurd to contend, as does the Government, that the jury could infer—speculate is a better word—that he "meant" he operated a tavern when the sale was made (Govt. Brief, p. 6, footnote 5).

stances in evidence from which an intent to sell to trade buyers may reasonably be inferred, unless it be held, as did the Circuit Court of Appeals, that such intent may be inferred from the fact that sales were made in quantities "in excess of normal individual consumption requirements," although such quantity sales are in themselves legal.

The situation would be entirely different had the Government offered any evidence that a purchaser informed petitioners when a sale was made that he was a trade buyer, or if the petitioners had learned such fact through other sources of information. In such circumstances actual knowledge of the occupation of the purchaser and a sale with such knowledge would afford a reasonable basis for inferring that the liquor sold under such circumstances had been purchased initially by petitioners for resale to trade buyers.

4. The Government does not argue that petitioners had knowledge of the occupation or purpose of any customer or that such knowledge was brought home to their clerks. Although conceding that the quantities of liquor sold were not the sole factor, the Government argues that such sales in quantities "in excess of normal individual consumption requirements" placed petitioners on notice that the purchasers might be buying for resale and this possibility imposed a duty on petitioners to ascertain the actual purpose of the purchase.[1]

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[1] The unfairness of the Government's position is evidenced by an incident concerning which some testimony was given. An inspector for the Alcohol Tax Unit was on petitioners' premises when a large quantity of liquor was being removed by the purchaser from the petitioners' premises onto a truck (R. 142-144). The inspector did not make any inquiry as to the name of the purchaser or the business in which he was engaged, nor did this inspector advise petitioners or their employees that it was their duty to obtain this information. He was concerned only with whether the sale was properly recorded on the Government form. If the quantity did not make the inspector suspicious, how can it reasonably be said that petitioners should have been? The first inkling petitioners had that the Government felt that an investigation was required was March of the year following the date of the sales, at which time an Alcohol Tax Unit investigator asked Mr. Esstman what steps he took to determine who his customers were (R. 125).

The Government has therefore, read into the statute a duty, the violation of which constitutes a crime, although such duty is not contained in the language of the statute or any regulations promulgated thereunder. If there is an obligation on the part of a liquor dealer to conduct an affirmative investigation as to the identity and purpose of a purchaser, he should be apprised of such duty in express terms, in advance, so that he may be in a position to take appropriate action. U. S. v. Durst, 59 F. Supp. 891, l. c. 893.

The Government charges that petitioners "evidenced complete and irresponsible indifference to whether their customers were trade buyers"[2] (Gov't Brief, p. 12), and that this "indifference" to the implied duty to investigate marks their conduct as willful. The failure to investigate is not the equivalent of shutting one's eyes to the nature of the business carried on by one's customers. The fact that petitioners did not make an investigation does not characterize their conduct as willful unless they knew or had reason to believe that the duty to make such investigation was imposed upon them by law. There is an entire want of evidence showing bad faith on the part of petitioners.

The Government's argument assumes that an investigation would have ascertained that the purchasers were trade buyers, although the record does not so show, and it is pure speculation to assume that such is the fact. Even as to the one person later proved to be a trade buyer at

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[2] This alleged "irresponsible indifference" is not based on any substantial evidence. As proof thereof, the Government cites testimony of a conversation between a Government inspector and petitioner Esstman (R. 125) the following year. At that time Esstman said "I am no detective" when asked what steps he took to determine whether his customers were in the liquor business. This is an equivocal statement. It means no more than that he had neither the training nor the facilities for making an investigation. As to petitioner Marglous there was not a scintilla of evidence. Inasmuch as neither petitioner had been notified an investigation was necessary, the failure to make one—particularly in the absence of suspicious circumstances—cannot fairly be said to evidence "complete and irresponsible indifference."

the time of purchase, the sale was of a relatively small quantity (12 cases). With respect to that sale there was no evidence showing that petitioners could have ascertained her occupation other than by an investigation off the premises, nor was there any evidence of any suspicious circumstances in connection with the sale which might have indicated that the purchaser was a trade buyer. If criminal intent may be inferred from failure to affirmatively investigate, then the conviction may be sustained even though there is no evidence whatever as to the actual occupation of any purchaser. Petitioners submit that this case is clearly one based upon suspicion, surmise and conjecture.

If the Government's argument is sound, it means that every retail dealer who makes any sale in excess of five wine gallons at any one time is bound, by reason alone of the quantity sold, to refuse to complete the sale until a careful investigation is made of the identity, occupation and purpose of the purchaser. As to retail dealers who consummate sales on their premises such a requirement is unreasonable, particularly in view of the fact that many purchasers are residents of other cities. It is further unreasonable because the extent of such investigation is not set forth in any regulation, nor for that matter is there any requirement by statute or regulation for an investigation of any nature.

The construction of the Act sought by the Government and sustained by the Circuit Court of Appeals is strained, unreasonable and impractical. There is an urgent necessity that this Court review the instant case for the purpose of correcting a manifest injustice and authoritatively construing the Act, so that retail liquor dealers may know in advance what course of conduct is illegal.

Petitioners submit that if there is a duty to use diligence to ascertain the identity, occupation and purpose of

every customer who purchases a quantity of liquor in excess of "normal individual consumption requirements," such a duty ought not be implied, but should be expressly set forth in the law or the regulations promulgated thereunder. It is seldom that a statute is so poorly implemented by regulation as the section involved in this case.

5. The Government wholly fails to comprehend the contentions of petitioners relating to the prejudicially misleading and inadequate nature of the charge to the jury. The fact that the trial court instructed the jury on the burden of proof, reasonable doubt and other cautionary matters in no way obviated the necessity for giving a clear and unambiguous instruction on the facts necessary to be found in order to convict under the Act. Whether or not the Court's instructions were otherwise correct, the fact remains that the only instruction the trial court gave on substantive matters is the terse and erroneous statement of the "issue boiled down." Petitioners' contention is not predicated upon isolated or piecemeal consideration of the court's instructions.

The Government argues that the entire charge gave the jury an accurate statement of the applicable law (Govt.'s Brief, p. 14). However, eliminating the cautionary instructions which do not in any way concern the facts of the case, the instructions do not furnish any guide whatever with respect to the relevant legal criteria. Petitioners submit that not even a lawyer, much less a layman, could read the instruction relating to the substance of the offense and understand the true issues involved, and be enabled to sift the evidence to determine those issues.

Nowhere does the trial court tell the jury that defendants cannot be found guilty unless they find that liquor was purchased by the defendants for the purpose and with the intention of selling the same thereafter to retail liquor

dealers. Nowhere is it stated that the jury must find that defendants could not be found to have acted willfully unless they intentionally sold liquor to persons known by them or their clerks at the time to be liquor dealers. In fact, the Court does not require the jury to find that any specific act of appellants was willfully done. Nowhere is any path charted for the jury. Willfulness and intent is not required to be found. To inform the jury, as the Court does, in effect, that the only issue for them to determine is simply whether the defendants sold liquor at wholesale for resale purposes, is to completely omit the essential ingredients of the offense, including the elements of purchases, willfulness, the knowledge and intent of the seller that the liquor is to be resold, and the knowledge by the seller that the purchaser is in fact a retail liquor dealer, and intends to resell the liquor purchased. The purpose of the buyer in making the purchase is not material unless it is actually known to the seller, because unless there is such knowledge there is no room for an inference that the liquor was purchased by appellants for such purpose. Nevertheless this instruction permits a finding of guilt to be based upon the purpose of the buyer rather than upon the purpose and intent of the appellants. It will be noted that the Court defined the statutory language as meaning "the purchasing for resale at wholesale to purchasers who make the purchase for the purpose of selling intoxicating liquors" (R. 265-266). Thus the knowledge and purpose of the seller is made immaterial and willfulness is not required.

The Government's argument, both with respect to the sufficiency of the instruction and the generality of the exception to the charge, is well answered by the decision of this Court in Screws v. U. S., 325 U. S. 91. In that case this Court ruled as follows:

> "It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. See Johnson v. United States, 318 U. S. 189, 200, 87 L. ed. 704, 713, 63 S. Ct. 549. But there are exceptions to that rule. United States v. Atkinson, 297 U. S. 157, 160, 80 L. ed. 555, 557, 56 S. Ct. 391; Clyatt v. United States, 197 U. S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 S. Ct. 429. And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a Federal crime are entitled to be tried by the standards of guilt which Congress has prescribed."

The **Screws** case is particularly in point on this question, in that it not only states the rule applicable where no exception is taken to the instruction, but also holds that the issue of willfulness must be submitted to the jury under appropriate instructions, and that in determining such issue the jury is entitled to consider all of the attendant circumstances. The instruction in the instant case is therefore erroneous because it did not submit the element of willfulness or require the jury to consider the attendant circumstances in determining whether appellants acted willfully.

These principles are again confirmed in M. Kraus & Bros. v. U. S., 66 S. Ct. 705, 710; U. S. v. Levy, 153 F. (2) 995, 998, and Williams v. U. S., 131 F. (2d) 21, 22-23.

In view of the evidence in the case, it was the Court's duty, by a fair and thorough instruction, to clearly charge the jury as to all of the necessary facts going to make up the offense denounced by the statute as criminal, so that the jury would be distinctly called upon to decide

from such evidence whether or not the defendants were engaged in the business of purchasing distilled spirits at wholesale, and whether or not, while so engaged, they disposed of the same to retail liquor dealers in violation of the statute.

All through the trial of the case, petitioners' counsel was insisting upon the necessity of a showing by the Government that petitioners intended to sell to liquor dealers, that petitioners or their clerks knew that purchasers were liquor dealers and that their conduct was willful. The Court was fully aware of what facts counsel deemed necessary to support a conviction. The instruction requested by them (R. 253), irrespective of any technical inaccuracy, sufficiently called the Court's attention to the law of the case.

In Hargrove v. United States, 67 F. (2nd) 820, l. c. 822, 823, the Court stated: "Defendants' requested charge contains some inaccuracies, some inadvertence. It, however, sufficiently called the Court's attention to the law of the case; the refusal to charge its substance was error."

In the appellate court the convictions of petitioners were sustained on the basis of inferences from quantity sales, failure to investigate and "indifference" to an implied duty. Yet none of these matters were submitted to the jury. How could the jury properly pass judgment on the issues of the case when they were not even told the elements of the offense broken down in such a way as to definitely aid them? That they did not understand the case from this instruction is evidenced by their conviction of defendant Hendin as to whom there was not a scintilla of evidence and whose conviction was reversed by the Circuit Court of Appeals.

Petitioners respectfully submit that the charge to the jury was prejudicially erroneous. The generality of the exception should not be a ground for refusing to consider

the error. Technical considerations relating to exceptions should not be of greater importance than the right of a defendant to a fair trial before a jury adequately instructed on the elements of the offense.

CONCLUSION.

The petitioners have been unjustly convicted of a crime, although their conduct was in accordance with law. As set forth in their petition and supporting brief, it is of great public importance that this court authoritatively construe the Federal Alcohol Administration Act in order that retail liquor dealers may conduct their businesses in accordance therewith. The importance of the questions and the conflict of decisions warrants the issuance of the writ of certiorari.

Respectfully submitted,

LOUIS B. SHER,
Attorney for Petitioners.

Joseph Nessenfeld,
Maurice L. Mushlin,
Of Counsel.

APPENDIX.

Form 1632
Treasury Department
Internal Revenue Service
(Rev. January 1941)

Application for Wholesaler's Basic Permit Under the Federal Alcohol Administration Act.

To District Supervisor,
.....District,
.....

The undersigned.....
.....
with principal office at.....
.....
hereby makes application for a basic permit to engage in the business of purchasing for resale at wholesale the following classes of alcoholic beverages:
.....
(Specify whether distilled spirits, wine, or malt beverages)
and in receiving, selling, and shipping, in interstate and foreign commerce, the alcoholic beverages so purchased.

The applicant agrees that he will operate in conformity with the Federal Alcohol Administration Act and amendments thereto; the Twenty-first Amendment and laws relating to the enforcement thereof; with all other laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; and all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which he engages in business.

All data, written statements, affidavits, evidence, or other documents submitted in support hereof, or upon hearing hereon, shall be deemed to be a part of this application.

.....
.....

Subscribed and sworn to before me this.....day of.....

.....

Form 1633
Treasury Department
Internal Revenue Service
July 1940

Permit.....

Wholesaler's Basic Permit.

(Under the Federal Alcohol Administration Act and Regulations)

.....

.....

Pursuant to application dated....., you are hereby authorized and permitted to engage, at the above address and at branch offices and other places of business, in the business of purchasing for resale at wholesale....., and, while so engaged, to sell, offer and deliver for sale, contract to sell and ship, in interstate and foreign commerce, the alcoholic beverages so purchased.

This permit is conditioned upon compliance by you with sections 5 and 6 of the Federal Alcohol Administration Act and all other provisions thereof; the Twenty-first Amendment and laws relating to the enforcement thereof; all laws of the United States relating to distilled spirits, wine, and malt beverages, including taxes with respect thereto; all applicable regulations made pursuant to law which are now, or may hereafter be, in force; and the laws of all States in which you engage in business.

This basic permit is effective from the date hereof and will remain in force until suspended, revoked, annulled, voluntarily surrendered, or automatically terminated, as provided by law and regulations.

This permit is not transferable.

.....
District Supervisor

Dated.....